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CHAPTER 3

Legal and Ethical Issues for the Beginning Counselor

Chapter Outline

Foundations of Legal and Ethical Practice
The Client–Counselor Relationship
Confidentiality and Privileged Communication
When in Doubt
Ethical Principles and Guidelines

Construction on the Golden Gate Bridge, that great engineering feat which was to connect San Francisco with Marin County, was interrupted by outrage from people over the frequent fatalities and maimings of workmen who fell from the span to the icy waters of the bay several hundred feet below. Newspapers fanned the public flame with gruesome pictures and heart-rendering stories of the men and the impact of their deaths among widows and fatherless children. The bridge was less than half finished, and there had already been 24 such accidents.

The sponsors and underwriters responded to the widespread distress by installing a configuration of strong nets beneath the entire working area. Accidental deaths were reduced to only four during the remainder of the construction. This was good, but there was also an unexpected result. Knowing the safety net was there, the physical confidence of the men increased, their equilibrium was substantially improved, and the total number of accidents of all kinds was greatly reduced.

The same idea applies in the counseling room. Counselors work with more personal confidence and will more nearly protect themselves from relational disasters when they are aware of the configuration of safety nets provided for those who work within the legal and ethical guidelines of their profession. Both the therapist and the client are protected by these nets.

Few professionals are more vulnerable to encountering potential legal troubles and ethical dilemmas than counselors (Cohen, 1992; Wilson & Ranft, 1993).

The voluminous numbers of articles and books on the subject are a silent witness to the perils. In this chapter, the basic legal and ethical issues pertaining to the counselor–client relationship will be introduced.

FOUNDATIONS OF LEGAL AND ETHICAL PRACTICE

A legal and ethical counseling practice is grounded on something counselors *are*, not something counselors *do*. The bedrock of legal and ethical counseling is *virtue*—a term rarely heard in psychology (Gelso & Fretz, 1992). Virtue should not be confused with a principle or rule, "rather it is a habit, disposition, or trait that a person may possess or aspire to possess. A moral virtue is an acquired habit or disposition to do what is morally right or praiseworthy" (Beauchamp & Childress, 1983, p. 261). The virtuous counselor, however, does not acquire ethical behavior through good intentions. The counselor with character begins by being legally and ethically competent. A sound counseling practice is built on knowing the law and understanding client rights (Hatton, Balente, & Rink, 1977). Virtue is nourished by deep roots anchored in the bedrock of the self. Virtue is grounded in an enlightened knowledge of the law; a clearly understood set of ethical, professional standards that are securely anchored from within; and personal values and beliefs which drive the morality of client relationships (Cooper, 1992).

Jordan and Meara (1990) present the idea of *virtue ethics*, which focuses on *being* as much as on *doing*. Virtuous counselors emphasize "not so much what is permitted as what is preferred" (p. 112). Personal values of the counselor are a basis for empowering the practice of ethical behavior (Wrenn, 1958). A counselor's ethical behavior involves more than subscribing to a code of ethics, for good ethics are built on a genuine concern for the client's welfare (Corey, Corey, & Callanan, 1993).

Counselors have an obligation to their clients and to their profession to be accountable for the quality of the professional services they offer. Legally, the therapist must possess the degree of learning, skill, and ability that others similarly situated ordinarily possess; must exercise reasonable care and diligence in the application of knowledge and skill to the patient's needs; and must use his or her best judgment in the treatment and care of patients (*Stone v. Procter* 1963; quoted in Furrow, 1980, p. 23). Effective counselors are transparent and fully honest with themselves about the limits of their own expertise (Pope & Vasquez, 1991). The American Psychological Association (1992) requires professionals to "provide services and only use techniques for which they are qualified by training and experience" (p. 390). Being competent as a therapist does not mean being able to treat every person that needs counseling. A responsible therapist will accept only clients that can benefit from the training and skill the therapist has acquired. Research has shown that inept counseling can indeed be worse than no treatment at all (Bergin,

> Perfect virtue is to do unwitnessed that which we should be capable of doing before all the world.
> —François de La Rochefoucauld

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1963). Competency includes knowing what issues you cannot treat because you are not qualified by training and experience. Simply reading a book or attending a weekend workshop devoted to a particular topic does not qualify a counselor to begin unsupervised therapy in a new treatment area. If a counselor wishes to expand an area of professional competence, supervision from a clearly qualified professional is essential. Failure to practice at a reasonable level of competence may result in accusations of malpractice (Jobes & Berman, 1993). Generally, malpractice is defined as "a failure to meet prevailing, professionally accepted standards of practice" (Blocher, 1987, p. 30).

When a counselor recognizes that a client's needs are beyond his or her expertise, the counselor is responsible for making referrals to other qualified counselors. In making referrals of clients, counselors need to help clients understand the reasons for the referral and the distinctive qualifications of the professional to whom the referral is made. If, for example, a counselor is referring a depressed client to a psychiatrist who specializes in psychotropic medication, the counselor should explain that a psychiatrist is practicing a medical specialty and that the psychiatrist may prescribe much needed medication to help the client better manage the depressive symptoms (Cormier & Cormier, 1991).

THE CLIENT–COUNSELOR RELATIONSHIP

The essential element in a therapeutic relationship is trust. Counseling deals with deeply personal issues and requires a high level of risk-taking on the part of clients. Without a reasonable level of trust, the therapeutic relationship cannot be very effective. Counselor effectiveness is proportionate to the level of trustworthiness between therapist and clients. As trust is diminished so is healing.

Informed consent is the basis of a trusting relationship and a cornerstone of counselor ethics. Through informed consent, clients are told what can be expected during treatment, how long it may take, and how much it will probably cost. They are also informed of their right to agree or decline to participate in any aspect of counseling (Green, 1993). The information is communicated, not in professional jargon, but in language that is easily understood. Informed consent also gives clients opportunities to ask questions. According to Schutz (1982), a therapist should "describe the therapeutic program recommended, indicating also the anticipated benefits of the program, the foreseeable material risks of treatment, and the likely results of no treatment" (p. 24).

> You can fool some of the people all the time, and all of the people some of the time, but you cannot fool all of the people all the time.
> —Abraham Lincoln

According to Cormier and Hackney (1987), counselors are responsible for providing the following information to clients at the outset of counseling:

1. A description of his or her role and qualifications as counselor.
2. An explanation of the process of counseling and any particular procedures or approaches to be used, and their purpose.

3. A description of any discomfort or risks that may evolve.
4. A description of any reasonably expected benefits.
5. A disclosure of other approaches or strategies that also may be useful.
6. An offer to answer inquiries about counseling or procedures at any time.
7. A statement that the client can withdraw consent and discontinue participation in a procedure or in therapy at any time.

Psychotherapy continues to battle the mistaken notion that therapists have "magical" powers—that therapists are latter-day miracle workers. Much of the public must be educated regarding the realities of counseling and professionals need to help dispel erroneous thinking about counseling. "Therapists," says Schutz (1982), "should attempt to create reasonable expectations for the public about what psychotherapy can and cannot do" (p. 95).

What about associating with clients outside of the therapeutic setting? "Deep down in his mind," according to Frieda Fromm-Reichmann (1950), "no patient wants a nonprofessional relationship with his therapist, regardless of the fact that he may express himself to the contrary" (p. 46). A relationship with a client outside of the therapeutic context will almost always complicate treatment (Borys & Pope, 1989). It leads to a tangled web of dual or multiple roles. To protect the welfare of clients, counselors must avoid dual relationships (Newman, 1993; Otero & O'Meara, 1991). Otherwise, he or she will run the risk of clouding objectivity and interfering with the therapeutic process. Dual relationships also increase the probability of sexual intimacies in psychotherapy, so often publicized (Bates & Brodesky, 1989; Cornell, 1994; Pope, 1990; Williams, 1992), as in Sidebar 3-1.

CONFIDENTIALITY & PRIVILEGED COMMUNICATION

A 15-year-old sat in the office of an inexperienced counselor. "Look, I need your help," he said. "Can I tell you a secret without you telling anyone else?" Sensing something serious and wanting the adolescent to open up, the new counselor agreed to keep quiet.

"My dad is a total jerk, and I can't handle it anymore. I got a ticket to California, and I'm gone, man. I want you to give me a week and then give my mom this." He handed over two folded sheets of white notebook paper, stapled shut.

The counselor tried to change the boy's mind or at least get him to talk with his father first. She offered to mediate the conversation, but, standing firm, the boy finally left unconvinced. Even though the counselor had agreed not to break the secret, she wondered if she shouldn't tell someone.

Problems of confidentiality are the most frequent source of ethical dilemmas for counselors (Pope & Vetter, 1992). Confidentiality can be defined as a relationship built on trust in which a client reveals private or secret information to a counselor with confidence it will not be passed on. Confidentiality assumes the counselor, "having grown powerful as a result of such knowledge, discloses

Sidebar 3.1

SEX IN THE FORBIDDEN ZONE

It is, in a way, the ideal setting for extraordinary intimacy. Patient and therapist are isolated from the world, focused on each other intently, exploring long-buried emotions. In successful psychotherapy, patients usually undergo something called transference, in which they come to see the therapist as an all-loving parent they can trust completely. The process can stir feelings in the therapist, too; power is a potent aphrodisiac. Freud warned that therapists should struggle against such "countertransference" and not abuse the patient's longing for love. Yet even some of his closest disciples couldn't withstand the temptations of the couch. Carl Jung took two patients as his mistresses. Otto Rank had a long affair with [a] patient.

History is replete with such indiscretions between psychotherapists and patients, and they've become the standard plot line for popular films from "The Prince of Tides" to "Basic Instinct. . . ." [Books like *Sex in the Forbidden Zone* and *Sex in the Therapy Hour* have explored therapeutic sexual ethics in detail. Nobody knows how widespread sex between therapists and clients really is, but one thing is certain:] A spate of widely publicized cases [is] forcing the [therapeutic] profession to take stronger action. "A lot more cases are being reported," says Shirley Siegel, cofounder of the group Stop Abuse By Counselors in Seattle. "Women are much more willing to come forward and report embarrassing situations." Eight states have enacted laws making sex between patients and therapists a crime, and several more are weighing criminal sanctions. Professional associations are also getting tougher about disciplining ethics abuse. The APA now publicizes the fact that in the last 10 years, it has expelled or suspended 113 members, mostly for sexual misconduct. . . .

Indiscretion between therapist and client was portrayed in "The Prince of Tides." *(Columbia Pictures Archive Photos/ Fotos International)*

Almost inevitably, patients who sleep with their therapists end up more emotionally scarred than when they began treatment. Sexually abused patients "look very much like incest survivors," says [psychiatrist Nanette] Gartrell. Many find it difficult to trust subsequent therapists, and most blame themselves for the encounter. In one national survey, it was found that 11 percent of patients who had sex with their therapists were hospitalized as a result; 14 percent attempted suicide and 1 percent succeeded. "When a therapist engages in sex with a patient, he or she is engaging in a potentially homicidal activity," [former chairman of the APA's ethics committee Kenneth] Pope says, "far more than getting into a car drunk and driving."

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the information to others only at the behest or with the consent of the [client]" (Dulchin & Segal, 1982, p. 13). This means that counselors do not talk to anyone about a client or even reveal that they are seeing a client without prior written permission from the client (Knapp & VandeCreek, 1987).

There is no justifiable excuse for inadvertent slips that reveal information shared in confidence. Even nondamaging information is to be protected (Abeles, 1992; Kompf, 1993). It is unethical, for example, to show a client's IQ test results to a counseling center receptionist—even if they are the highest IQ scores you have ever seen. Gelso and Fretz (1992) state that "any information obtained in professional relationships is to be treated confidentially" (p. 56). Clients deserve to have their personal information protected by strict confidentiality. It frees clients from worrying over who might hear the private information they discuss with the therapist. Confidentiality protects clients from having confessional gossip or tidbits about themselves passed on. Pure confidentiality is a hallmark of professional counseling (Sheeley & Herlihy, 1986).

Confidentiality, however, does have limits (Denkowski & Denkowski, 1982; MacNair, 1992). Confidentiality is an ethical principle rather than a legal statute. Confidentiality, according to Siegel (1979), involves "professional ethics rather than any legalism and indicates an explicit promise or contract to reveal nothing about an individual except under conditions agreed to by the source or subject" (p. 251). Legally, the concept of confidentiality is known as privileged communication. It spells out the legal conditions for breaking confidence with a client (DeKraai & Sales, 1982; Herlihy & Sheeley, 1987). Shah (1969) defines privileged communication as "the legal right which exists by statute and which protects the client from having his confidences revealed publicly from the witness stand during legal proceedings without his permission" (p. 57). Lawyers, physicians, ministers, and psychologists are among the few professionals who have a legal right to claim privileged communication.

> You may be deceived if you trust too much, but you will live in torment if you don't trust enough.
>
> —Frank Crane

Ethical dilemmas, such as the one at the beginning of this section, also arise because of a conflict between what is best for the client and what is best for other involved people. Blocher (1987) states that "when a counselor encourages a client to believe that a communication will be held in full and complete confidence, the only ethical ground for breaking that confidence is danger to human life" (p. 27). In other words, privileged communication does not hold up in cases where the counselor has reasonable cause to believe that the person is in such a psychological state as to be dangerous to himself (i.e., suicidal) or to the person or property of another. For example, health and mental health professionals have a duty to warn the sexual partners of clients with AIDS if the clients refuse to do so themselves (Cohen, 1990; Harding, Gray, & Neal, 1993; Lamb, Clark, Drumheller, Frizzell, & Surrey, 1989). The next chapter will have much more to say about AIDS as a counseling issue.

In such cases, counselors have a "duty to warn" (see Sidebar 3-2) by disclosing information that can prevent a threatened danger (Gehring, 1982; Leslie, 1983). Berger (1982) concludes that a confidence should be broken when the client is in danger to himself or others, when the client is engaged in criminal actions, when the counselor is so ordered by the court, and when it is in the best interests of a child or an elder who is a victim of abuse.

Clients should be apprised of the limits of confidentiality at the outset of therapy. Counselors should also obtain client permission before tape recording a session or sharing information with a supervisor (McGuire, Graves, & Blau, 1985). Of course, supervisors, like counselors, are obligated to respect the confidentiality of client communication. "When a clear policy exists and is explained to the client before confidences are accepted, many ethical and professional problems can be avoided" (Blocher, 1987, p. 26).

Law is reason free from passion.
—Aristotle

Sidebar 3-2

PRIVILEGE AND PUBLIC PERIL: THE DUTY TO WARN

In August 1969, Prosejit Poddar informed his counselor that he was planning to kill his girlfriend. Poddar was a voluntary outpatient at the Cowell Memorial Hospital on the Berkeley campus of the University of California. The therapist later called the campus police and told them of this threat. He asked the campus police to observe Poddar and watch for danger signs that might require psychiatric hospitalization.

The campus officers did take Poddar into custody for questioning, but they later released him because he was "rational." Poddar's counselor followed up his call with a formal letter requesting the assistance of the chief of the campus police. Later, the counselor's supervisor asked that the letter be returned, ordered that the letter and the therapist's case notes be destroyed, and asked that no further action be taken in the case. No warning was given, either to the intended victim or to her parents, of Tatiana's peril.

Two months later, on October 27, 1969, Poddar killed Tatiana Tarasoff. In what is now a landmark court case referred to as the Tarasoff decision, Tatiana Tarasoff's parents filed suit against the Board of Regents and employees of the university for failing to notify the intended victim of the threat. A lower court dismissed the suit; the parents appealed; and the California Supreme Court ruled in favor of the parents in 1976 and held that a failure to warn the intended victim was irresponsible.

This case resulted in the establishment of laws requiring psychotherapists to warn individuals when they become aware of intentions to harm: "We conclude that the public policy favoring protection of the confidential character of patient–psychotherapist communication must yield to the extent that exposure is essential to avert danger to others. The protection privilege ends where the public peril begins." (Beauchamp & Childress, 1983, p. 283).

WHEN IN DOUBT

Few things damage social dignity as much as physically stumbling over some unseen object. Missing a step is humiliating. But, assuming no one is hurt, it is always humorous to onlookers when the elegantly dressed stumble and fall. When a professional and proper musician, for example, steps onto a platform with music in hand, stumbles, and sends sheets of music into the air, it takes a good emcee to recover from the embarrassment and have the audience laughing with him instead of at him. Unfortunately, qualified counselors also stumble professionally but it is never a laughing matter. Misjudgment occurs when counselors do not utilize accessible resources for understanding and practicing the legal and ethical standards of counseling—consultation with other colleagues.

When in doubt, consult an experienced colleague. Legal and ethical considerations can be complex and confusing, so effective counselors regularly consult with other professionals on issues that are unclear (Sileo & Kopala, 1993; Taylor & Gazda, 1991). Consultation can take the form of a brief phone call or be as extensive as bringing in a colleague to observe your sessions. Counselors can also obtain guidance by phone consultations with state and national counseling associations such as the American Counseling Association or the American Psychological Association.

In addition to consulting with professional colleagues, competent counselors also commonly make referrals to other counselors who can meet the needs of a particular client more effectively than themselves. MacDonald (1992) has compiled a list of situations likely to call for referral (based on Cormier & Cormier, 1991; Seligman, 1986). A referral may be necessary when the following situations arise:

- Your client wishes to pursue matters that are contrary to your value system, to professional ethics, or to legal codes.
- You lack essential knowledge and/or skills for the best modes of treatment for each client.
- Personality differences between you and your client prevent working together effectively.
- Interpersonal connections with the client outside of counseling might create a conflict of interest (e.g., being asked to counsel a family member of an associate).
- You and your client are making little progress toward treatment goals and prospects for making greater progress are dim.

In addition, it is a good idea to refer a person for a thorough physical examination as part of the counseling evaluation (Cavanaugh, 1990). It can also be helpful to enlist the aid of a minister, priest, or rabbi, especially when the person communicates a need for spiritual comfort during crisis interventions. Referral to a counselor of the same sex may help a client feel more comfortable. A woman whose husband has just left her may make more progress, for example,

with a female therapist. Referral can be appropriate and helpful in a number of situations, for both ancillary work with the primary counselor as well as a final referral when the counselor is doubtful about her or his ability to meet the needs of the client effectively.

ETHICAL PRINCIPLES AND GUIDELINES

Determining what is or is not ethical behavior is often difficult, not only for the novice counselor, but for the experienced practitioner as well. Thankfully, the helping professions offer several guidelines and codes of ethical behavior to lead them through perpelexing ethical dilemmas. These codes include *Code of Ethics*, published in 1989 by the National Board of Certified Counselors (NBCC); the *AAMFT Code of Ethics*, adopted by the American Association for Marriage and Family Therapists (1991); *Code of Ethics for Mental Health Counselors*, adopted in 1987 by the American Mental Health Counselors Association (AMHCA) and supported by the National Academy for Certified Clinical Mental Health Counselors (NACCMHC); *Ethical Guidelines for Group Counselors*, approved in 1989 by the Association for Specialists in Group Work (ASGW); *Ethical Principles of Psychologists and Code of Conduct Standards*, adopted by the American Counseling Association (1988); and *Ethical Standards for School Counselors*, adopted in 1984 by the American School Counselors Association (ASCA). Not only have these national professional groups provided ethical guidelines for their members, but many state counseling and psychological associations have also adopted their own versions of ethical standards.

| Where law ends, tyranny begins.
—William Pitt

Perhaps the most widely used guidelines for ethical behavior come from the American Psychological Association (1992) and the American Counseling Association (1995). These documents should be consulted by any practitioner in doubt about specific ethical questions. Both sets of guidelines are reprinted in the study guide that accompanies this book.

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